Supreme Court, U.S.
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No. 93-76

In The

Supreme Court of the United States

October Term, 1993

GEORGE CHERREY, *et al.*,

Petitioners,

vs.

GERALD DIAZ, *et al.*,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI

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COUNTER STATEMENT OF THE CASE

Petitioners entered into a contract to purchase investment real estate in December, 1986. Petitioners do not allege having any contact with this respondent until after the contract was signed. Petitioners closed on the sale in January, 1987 without first conducting a thorough inspection of the properties. They subsequently became dissatisfied with their investment. Petitioners took no legal action against respondents, however, until May 15, 1991, when they filed a civil RICO action claiming that some of the respondents made misrepresentations, upon which petitioners relied, as to the condition and value of the properties. The district court dismissed the complaint as time barred by the four-year statute of limitations adopted by this Court in *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U. S. 143, 107 S. Ct. 2759, 97 L. Ed. 2d 121 (1987), finding that the petitioners had knowledge of their injury, if any, more than four years prior to the filing of their complaint. The United States Court of Appeals for the Fourth Circuit affirmed.

Petitioners allege that in 1991 they learned for the first time that two other couples, who also claimed to have relied on alleged misrepresentations by the respondents, had also purchased real estate from them without first conducting a thorough inspection. Petitioners contend that their claimed discovery of similar alleged injuries to *others* should resuscitate their causes of action.

SUMMARY OF ARGUMENT REASONS FOR DENYING THE WRIT

The conflicts of decisions asserted in the Petition for Writ of Certiorari, when properly understood, are not genuinely at odds with the holding in the instant case. Petitioners' case turns on its own specific facts, and no amount of sophistry can convert it into one warranting review on certiorari. The decision of the court of appeals in the case at bar is in accord with all other decisions by a court of appeals in which a similar factual issue has been presented. Even if there were a conflict, the acts alleged in the petitioners' Amended Complaint fail to state a claim under RICO, and the judgment for which petitioners seek review is therefore amply supported on grounds other than limitations.

ARGUMENT

Petitioners concede that the law in the First, Second, Fourth, Seventh and Ninth Circuits, which hold unequivocally that the statute of limitations in a civil RICO action accrues at the time plaintiffs know or should know of their injury, bars their claims. Petitioners argue, however, that conflict exists among the circuits because cases in the Third, Eighth, Tenth and Eleventh Circuits hold that the statute of limitations in civil RICO actions accrues when the plaintiffs know or should know of both their injury and the defendants' pattern of racketeering. Petitioners then attempt to bootstrap themselves into the discovery of a "pattern" by claiming their discovery of similar

allegations by others should start their own limitations period running anew.

A. None of the cited cases presents a conflict.

Petitioners refer to several cases in support of their contention that an irreconcilable conflict exists among the circuits: *Glessner v. Kenny*, 952 F. 2d 702, 706 (3d Cir. 1991); *Granite Falls Bank v. Henrikson*, 924 F. 2d 150, 154 (8th Cir. 1991); *Bath v. Bushkin, Gaims, Gaines and Jonas*, 913 F. 2d 817, 820 (10th Cir. 1990), *abrogated on other grounds, Lampf, Pleva, Lipkind, Prupis & Pettigrow v. Gilbertson*, 111 S. Ct. 2773, 2777 n.1, 115 L. Ed. 2d 321 (1991) and *Bivens Gardens Office Building, Inc. v. Barnett Bank of Florida, Inc.*, 906 F. 2d 1546, 1554-55 (11th Cir. 1990) *cert. denied*, 111 S. Ct. 1695 (1991). Petitioners make no attempt to apply the law in these cases to the facts of their cases, however. When limited to their facts, none of the cases alluded to in the Petition for Writ of Certiorari presents a conflict with the decision for which petitioners seek review.

In *Glessner, supra*, plaintiffs purchased allegedly defective furnaces between 1975 and 1984 and filed suit in 1988. The court of appeals affirmed the dismissal of their RICO claim, holding that it was time barred because, *inter alia*, "this injury was admittedly known to these plaintiffs before [four years before suit was filed]," 952 F. 2d at 707.

In *Granite Falls, supra*, the court of appeals adopted the standard of accrual announced in *Bivens, supra*. The *Granite Falls* court reversed and remanded a case dismissed as time-barred, stating, "the question remains open on remand, after evidentiary development, whether

under [the *Bivens* rule] the Bank's RICO claims are time barred because the Bank either did discover, or reasonably should have discovered, these claims more than four years prior to the commencement of this action," 924 F. 2d at 155.

Bivens involved allegations that several different harms were allegedly committed by defendants over a period of eight years against various victims. One of the victims, Konstand, filed a state court action against the RICO defendants in 1975 that revealed he knew then that he had been the victim of multiple fraudulent acts at the hands of defendants. The federal court of appeals therefore held that his RICO action, filed more than four years later, was time-barred.

Similarly, in the case at bar, petitioners' Amended Complaint reveals that they knew, no later than 1987, that they had not fully inspected the properties and of the other acts of respondents about which they complain – representations as to the value of the property, the condition of the property, etc. The fact that other alleged victims may have had different states of knowledge regarding their own alleged victimization is not dispositive of when petitioners' claims accrued, even under *Bivens*. That court found it appropriate to analyze "when *each* plaintiff knew or should have known that his injuries were the result of a pattern of racketeering activity when determining when *each* plaintiff's civil RICO cause of action began to accrue," 906 F. 2d at 1554 (emphasis added). Under this test, petitioners' claims would be time barred, even though the claims of the other alleged victims, who purchased their property in later years, might not be.

Bivens acknowledged that in a case involving an injury that occurred only on one occasion, the rule announced in *Bowling v. Founders Title Co.*, 773 F. 2d 1175, 1178 (11th Cir. 1985), *cert. denied sub nom. Zoldessy v. Founders Title Co.*, 475 U. S. 1109, 106 S. Ct. 1516, 89 L. Ed. 2d 915 (1986) would be instructive. In *Bowling*, several different plaintiffs were injured when a buyer failed to close on a real estate transaction. The court held that the RICO cause of action accrued as to each plaintiff when that particular plaintiff discovered that the transaction had fallen through. Using this approach, the result would be consistent with that reached by the court of appeals in the decision for which review is sought: the time when respondents' other alleged victims purchased their property would determine when the *other* victims' claims accrued – not petitioners'.

In *Bath, supra,* the court of appeals reversed and remanded a dismissal based on limitations for a determination of the RICO accrual time, but stated that the time the injury and pattern were identified is not made irrelevant by identifying one predicate act that occurred within four years of the filing. 913 F. 2d 821, n.2. The district court in the case at bar found that petitioners knew several months before May, 1987 of their injury; the Amended Complaint alleges that the pattern of acts of respondents occurred before or at the time of closing in January, 1987. Suit was not filed until May 1991. Petitioners' claims are therefore time barred under *Bath.*

Even the court adopting the most expansive accrual rule,[1] *Keystone Ins. Co. v. Houghton,* 863 F. 2d 1125 (3d Cir. 1988), which is not cited by petitioners, admits the simple discovery of the injury rule adopted by the majority of the circuits is the appropriate one to use, where, as here, the alleged RICO violation has just one victim. "The simple discovery rule is an effective rule where the facts indicate that there was one victim and each element and all predicate acts of a RICO violation were present at the same time. It is only in the case where multiple victims, or multiple injuries or predicate acts extending over a period of time are present that the rule we announce is different in application from the simple discovery rule," 863 F. 2d at 1133.

Before *Agency Holding, supra,* various circuits dealt with the absence of a civil RICO statute of limitations by "borrowing" from various other "analogous" statutes, resulting in much inconsistency and uncertainty. This Court ended the controversy by borrowing the limitations period of the Clayton Act. One court has taken the next logical step by examining the Clayton Act's perspective on the accrual issue we face in the case for which review is sought. The court concluded,

> The Clayton Act, as far as we are aware, starts the statute running once a particular plaintiff realizes that he has been overcharged because of

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[1] The sixth circuit observed in *Agristor Financial Corp. v. Van Sickle,* 967 F. 2d 233, (6th Cir. 1992), that "... under [the *Keystone*] rationale, in certain cases where the illegal activity is allegedly continuous, the statute of limitations will never begin to run. This conflicts with the public policy of repose which is the source of such statutes in the first place," 967 F. 2d at 241.

> price-fixing; the fact that the *same* conspiracy may, at a later time, have injured someone else does not postpone the first plaintiff's accrual date. Assume, for example, that buyers of, say, plumbing supplies realize, say in 1980, that a price-fixing conspiracy has raised the price of the fixtures they have bought. Assume further that the same plumbing conspirators, as part of the same conspiracy, raise the price of plumbing fixtures sold to *different* buyers in, say 1990. We are aware of no case, nor any other legal authority, that would suggest that the limitations period applicable to the *first* group of buyers does not begin to run until 1990, when the *second* group is injured.

Rodriguez v. Banco Central, 917 F. 2d 664, 666 (1st Cir. 1990). Petitioners speculate that some circuits would allow the limitations period applicable to the first group of buyers begin to run after the second group is injured if this hypothetical case were brought in the context of a civil RICO action. But as a careful examination of the cases reveals, no case has so held, and no conflict exists among the circuits that have addressed that type of factual scenario.

B. Even if a conflict does exist, the judgment for which review is sought is supported on other grounds.

Recognizing that their civil RICO claim for injuries caused by alleged misrepresentations to them in connection with the purchase of their investment properties was time barred under any test, petitioners tried to reset the limitations clock by finding another person with a similar

problem. Such allegations, even if true, however, do not rise to the level of RICO "pattern." A RICO "pattern" must include a "continuity prong" as well as "specific allegations showing a distinct threat of continuing racketeering activity," *Myers v. Finkle*, 950 F. 2d 165, 169 (4th Cir. 1991). Neither of these elements is alleged in the case at bar. The fact that other purchasers may have failed to inspect thoroughly their properties, or may have relied on alleged puffery by or opinion of a seller, does not constitute a RICO "pattern."

Moreover, petitioners failed to allege sufficient facts to state a claim for fraud, constructive fraud, or civil RICO violation, against this respondent. There is no allegation that this respondent, a bank, did anything to induce petitioners to enter into their contract with sellers. In fact, the Amended Complaint claims that the alleged wrongdoings of the respondent bank were made at closing, *after* petitioners had already entered into the binding contract of sale. In Maryland, the relationship of a bank to its customer is contractual, not fiduciary. *Yousef v. Trustbank Savings, F. S. B.*, 81 Md. App. 527, 568 A. 2d 1134 (1990). Consequently, there can be no greater duty attached to this respondent than that contained in the contractual documents, and no such breach is alleged.

Finally, ample grounds other than limitations exist in the record to support the judgment for which review is sought, although they were not relied upon by the lower courts. These grounds are contained in the motions to dismiss, memoranda in support thereof and in reply memoranda filed by respondents in the district court, and made a part of the appendix to brief of appellant in the court of appeals.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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